



Australian Government Attorney-General's Department  
Criminal Justice Department

Discussion Paper – Forced and Servile Marriage

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## Introduction

Women's Health West (WHW) is the regional women's health service for the western metropolitan region of Victoria. Our services include research, health promotion, community development, training and advocacy around women's health, safety and wellbeing. Since 1994, WHW has hosted the region's largest family violence crisis support and prevention program. These two main arms of the service place WHW in a unique position to incorporate women's experiences directly into our research, health promotion and project work, ensuring that we clarify the connections between structural oppression and individual experience. As a feminist organisation we focus on redressing the gender and structural inequalities that limit the lives of women. WHW's work is underpinned by a social model of health and, as such, we recognise the important influence of, and aim to improve, the social, economic and political factors that determine the health, safety and wellbeing of women and their children in the western region.

Informed by the vision of equity and justice for women in the west, WHW work is guided by the following five strategic goals:

- Delivering and advocating for accessible and culturally appropriate services and resources for women across the region
- Improving the conditions in which women live, work and play in the western region of Melbourne
- Putting women's health, safety and wellbeing on the political agenda to improve the status of women
- Recognising that good health, safety and wellbeing begins in our workplace
- Working with others to achieve our goals

## Response to the discussion paper

WHW welcomes the opportunity provided by the Australian Government Attorney-General's Department for public comment on the discussion paper on forced and servile marriage.<sup>1</sup> We would like to take this opportunity to congratulate the Attorney-General's Department for its consideration of this important issue. WHW recommends the introduction of a suite of legislative and non-legislative reforms aimed at addressing forced and servile marriage are necessary to ensure that women and girls' basic human right to liberty, freedom and integrity are protected and upheld. WHW applauds the release of the discussion paper and associated consultation process as positive steps towards ensuring that action is taken to prevent, address and respond to forced and servile marriage within an Australia context.

### What is known about forced and servile marriage in Australia?

Servile marriage generally refers to circumstances where a person - most often women and girls - are sold, transferred or inherited into marriage. The practice of forced marriage is a fundamental abuse of human rights and occurs through:

*Force, coercion or deceit ... [and] is entered into without full consent and under duress, where the individual has no right to choose a partner or ability to say no (USDS, 2010: 15).*

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<sup>1</sup> The terms forced marriage and servile marriage are used interchangeably throughout this submission

While not all cases of forced marriage are the result of human trafficking, the *United States Trafficking in Persons Report* (2010) emphasised that there is a clear link between the two practices as many women and girls are trafficked for the purpose of forced and servile marriage.

Currently in Australia there remains limited reliable information about the nature and extent of such practices. In 2010 the issue entered the public domain after it was reported that a 17-year-old girl saved herself from being sent to Lebanon to be married after she called the Australian Federal Police (TLR, 2010). The case was heard before the Federal Magistrates Court where an order was enacted to prevent her family from taking her outside Australia. It has been estimated by the Australian non-government organisation Project Respect (2004) that there are up to 1,000 trafficking victims currently under debt bondage in Australia. Though, such estimates do not include the extent of trafficking for the purpose of servile marriage, as little is known about the practice in Australia. Various studies in the United States have attempted to investigate human trafficking and the types of slavery people are trafficked into. Of five studies completed between 2002 and 2007, it was estimated that anywhere between 1 percent and 37 percent of human trafficking was for domestic and sexual servitude and servile marriage (Logan, Walker and Hunt, 2009). Evidently there is a clear need for accurate information on the nature and scope of such practices in Australia, including data relating to the number of women and children who are trafficked both into and out of Australia for forced marriage.

## **Options for reform**

### **Legislation – new criminal offences**

**Section 63:** WHW fully supports Commonwealth law reform and the introduction of new criminal offences that specifically pertain to the offence of forced and servile marriage. Current state, territory and Commonwealth laws in Australia do not fully address such practices and therefore limit the extent to which perpetrators can be held to account for their criminal conduct. The United Nations' *Good Practices in Legislation on 'Harmful Practices' against Women Report* (2009) insists that legislation needs to create a specific offence for both forced marriage and child marriage. The United Nations (2009) also emphasises the importance of ensuring that such definitions are broad enough to encompass the array of practices related to forced marriage so that they can be punishable before the law. WHW therefore supports the introduction of an offence of 'forced or servile marriage', which defines such practices as any marriage entered into without the free and full consent of both parties (UN, 2009).

**Section 64/65:** WHW supports forced marriage being legally defined in a manner that is consistent with Australia's international law obligations. Hence, WHW deems it appropriate to adopt the use of the gender specific definition provided by the *Supplementary Convention on the Abolition of Slavery 1956*. Article 1 (c) of the Supplementary Convention prohibits '...any institution or practice whereby:

- (i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group
- (ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) the woman on the death of her husband is liable to be inherited by another person.'

Yet, as the term forced and servile marriage is not specifically used in the Supplementary Convention, WHW recommends the inclusion of such terminology.

**Section 66:** WHW supports the introduction of a clause relating to the offence of forced marriage that requires an individual to have an *intention* to bring about a forced marriage. It is essential for such laws to ensure that individuals can be prosecuted if they *knew of* or were *reckless* in assisting a forced marriage to take place. The introduction of such legislation is vital as it ensures that those who profit from trafficking women and girls into forced marriages can be prosecuted for their criminal conduct. This is essential given international research that has shown that women and children are often trafficked for the purposes of forced and servile marriage (Logan, Walker and Hunt, 2009).

**Section 67:** WHW advocates for such legislation to include circumstances where victims have been forced into servile marriage through physical forms of coercion, as well as non physical forms of coercion and violence.

**Section 68:** WHW supports the introduction of legislation that allows for individuals who have an intention to bring about a force marriage to be found guilty of an offence even if a forced marriage has not taken place.

**Section 69:** WHW supports the introduction of legislation into the criminal code relating to child marriage. While section 95 of the *Marriage Act 1961* states that it is a criminal offence for a person to go through a marriage ceremony with a person who is under 18 years of age, there is a clause that allows minors to marry in particular circumstances such as when parental consent has been granted. The Marriage Act also has no jurisdiction over marriages that occur outside Australia. Subsequently, WHW supports the introduction of legislation that prohibits child marriage practices within Australia and in instances when an Australian child is married overseas. WHW considers the inclusion of an offence relating to child marriage as essential, given that 'children are, by definition, incapable of consent or of exercising the right to refusal, child marriage is forced marriage, and as such violates fundamental human right standards and must therefore be strictly prohibited' (UN, 2004).

**Section 70:** The discussion paper outlines international responses to forced and servile marriage, which details maximum penalties that have been enacted in other countries. WHW recommends that Australia should adopt a model similar to New Zealand. New Zealand's *Crime Act 1961* contains an offence of 'dealing with slaves' whereby the issue of forced marriage is dealt with. Under section 98 of the Act it is an offence for a person to give a woman into marriage or to transfer a woman to another person without her consent, for gain or reward. It is also an offence to inherit a woman on the death of her husband. The penalty for these offences is imprisonment not exceeding 14 years. While numerous countries have introduced penalties that range from two years (for instance, Belgium and Denmark) to up to six years imprisonment (for instance, Norway), WHW supports Australia adopting a strong legislative stance against the practice of forced marriage similar to that of New Zealand. A high maximum penalty is necessary given that the practice of forced marriage is a fundamental breach of an individual's human rights that usually involves ongoing violence, exploitation and slavery-like practices. Indeed, there are many ways that the justice system can respond to perpetrators of violence against women and girls, one of which is to introduce deterrents such as sentencing and prolonged incarceration (NCVR, 2009: 133). Moreover, WHW advocates for the

introduction of a high maximum penalty for child marriage. Therefore, WHW supports the introduction of a penalty of 20 years imprisonment for the offence of child marriage, as is suggested in the discussion paper.

**Section 71:** WHW recommends that legislation relating to forced marriage should carry jurisdiction in the following situations:

- a. The offence occurs in Australia
- b. The offence is committed against an Australian citizen or resident outside Australia, or
- c. The offence is perpetrated by an Australian citizen or resident outside Australia.

## **Legislation – amendment to the Marriage Act**

Currently in Australia it is a criminal offence for a person to marry another person who is under the age of 18 years. Though, under section 12 of the Marriage Act a court order can allow a person aged between 16 and 18 to marry a person of any age who is 18 years or older. WHW recommends that the section of the Marriage Act that permits people under the age of 18 to marry in particular circumstances is removed. WHW considers this to be necessary as this section of the Marriage Act contradicts the introduction of legislation relating to child marriage and could allow child marriage practices to occur in Australia or to Australian citizens overseas.

## **Legislation – civil measures**

**Section 90:** In conjunction with legislative reform, WHW supports civil measures being made available in situations of forced and servile marriage. The discussion paper outlines two cases where the Family Law Court made an order to protect two Australian girls from being taken overseas by their families to be married. Both cases are important examples of how civil measures can be enacted to assist in the protection of minors from being forced into servile marriage.

**Section 94:** However, as stated in the discussion paper, protection orders through the Family Law Court are only available to people under the age of 18 years. Hence, WHW strongly supports the introduction of protection orders (that would be obtainable through the Marriage Act) to protect people over the age of 18 years at risk of forced marriage or who have already been forced into marriage. Civil remedies are essential to ensure the immediate protection of victims.

**Section 96:** WHW has considerable concerns about the use of court ordered mediation and family counselling prior to or following a forced marriage. Evidence to date indicates that mediation is for the most part inappropriate in instances of violence against women as it is based on the assumption that both parties participating in mediation are equal. This is not the case in situations where a person or persons are attempting to use physical, emotional and financial duress or deception to force another into marriage. Mediation can also place victims at considerable risk of violence, as is evident in cases in the United Kingdom where individuals have been murdered by their families during mediation sessions (FCO, 2005). WHW also opposes the idea that mediation should be an alternative to legislative measures and the prosecution of individuals that perpetrate acts of forced marriage. If civil measures are enacted, they must complement legislative reform. Indeed, criminalising the practice of servile marriage sends a clear message that this

form of violence against women will not be tolerated in Australia, which in turn can provide a deterrent for such practices.

## **Non-legislative responses**

**Section 99:** In order to comprehensively deal with the practice of forced marriage WHW believes that non-legislative measures are also required. We support the three proposed non-legislative measures as outlined in the discussion paper. These include:

- Information and education to inform individuals of their rights, responsibilities and the range of support services available
- Education, training and awareness raising for professionals who might come into contact with individuals affected by forced or servile marriage, and who may be able to inform and educate individuals about their rights and responsibilities (for example, marriage celebrants, teachers, medical practitioners, youth workers, women's groups, law enforcement agencies, prosecutors, counsellors, mediators, immigration and embassy officials); and
- Engagement between government, the community, support groups and organisations to discuss relevant issues and propose strategies for dealing with these practices.

Moreover, WHW supports the inclusion of additional non-legislative measures, such as:

- Government-funded research into the extent and nature of forced marriage in Australia
- Increased funding for support services such as housing and refuge assistance, legal advice, counselling and financial assistance to protect and support victims of forced marriage.

**Section 100:** The provision of information and education to the public may assist in raising general awareness of the practice of forced marriage and the harmful impacts it has on women and girls. Yet, given that the nature and extent of forced marriage is currently unknown in Australia, WHW supports government-funded research to provide a clearer picture of the incidence and effects of such practices. Research into the nature and scope of forced marriage is needed to inform community education to ensure that strategies are comprehensive and culturally appropriate. Without a sound understanding of forced marriage in the Australian context, community education strategies run the risk of marginalising minority communities. This can further isolate and marginalise victims of forced and servile marriage, which can limit their pathways to safety and further exacerbate their risk of violence.

**Section 101:** See comments relating to mediation as outlined in section 96.

**Section 102:** WHW recommends that attention and resources are allocated to ensure a range of supports - including housing and refuge assistance, legal advice, counselling, financial assistance, potential change of identity, assistance returning to education and in some cases assistance to return to Australia - are available to victims of forced marriage. We also emphasise the importance of improving access to interpreters as well as the provision of information in languages other than English as additional strategies for improving access to services for people of non-English speaking backgrounds who are at risk of, or experiencing forced marriage.

WHW would also like to acknowledge specific concerns for the health and wellbeing of migrant women and girls experiencing forced marriage or for those who have been trafficked for the purpose of forced marriage. Trafficking victims who cooperate with authorities in investigations and prosecutions of traffickers can qualify for a temporary visa and after two years a permanent visa. Though, as highlighted in the *United States Department of State Trafficking in Persons Report (2007)*, of the 58 temporary visas that have been granted in Australia since 2004, as yet no trafficking victim has been granted a permanent visa. Similarly, many migrant women escaping forced marriage and other forms of violence have no entitlement to public funds such as Centrelink payments, Medicare or rights to public housing (Athaide, 2011). This means that services that support these women, such as WHW, do so at their own cost (Athaide, 2011). Indeed, WHW advocates for changes that ensure that visa applicants and women who have been trafficked do not remain in forced marriages due to fear of deportation, losing their children or being imprisoned (Logan, Walker and Hunt, 2009). WHW strongly recommends that government takes action to ensure that women in all visa categories, and the services that support them, have access to public funds including legal and interpreter services, housing and refuge assistance, counselling and financial assistance.

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